FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-322

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR MICHAEL WAYNE JOHNSON; LAURA DUNBAR, AS GUARDIAN *AD LITEM* FOR RICKINA ROSSITER AND GLEN ROSSITER, JR., AND MARY WOOD, AS GUARDIAN *AD LITEM* FOR LESLIE D. WOOD,
Respondents.

On Writ of Certiorari to the Supreme Court of Idaho

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE* URGING REVERSAL, BUT IN SUPPORT OF NEITHER PARTY

Paul Alan Levy
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for *Amicus Curiae*

February 9, 1990

TABLE OF CONTENTS

Page:

Table of Authorities iii

Interest of *Amicus Curiae* 1

Statement 3

Summary of Argument 5

ARGUMENT

I. The Question of the Circumstances in Which the States May Regulate a Union's Representation of Its Members During the Term of a Collective Bargaining Agreement Raises Complex Issues of Federalism That Should Be Avoided Unless the Question Is Squarely Presented. 8

II. Respondents' State Law Claims Are Preempted by Section 301 Because They Are Substantially Dependent on the Interpretation of the CBA and the Union Constitution. 14

III. The Judgment Below Should Be Reversed. 21

Conclusion 28

TABLE OF AUTHORITIES

Cases: **Page:**

Allis-Chalmers Corp. v. Lueck,
471 U.S. 202 (1985) 4, 14, 16

Barrentine v. Arkansas Best Freight System,
450 U.S. 728 (1981) 2

Belknap v. Hale,
463 U.S. 491 (1983) 23

Boys Markets v. Retail Clerks Local 770,
398 U.S. 235 (1970) 24

Breininger v. Sheet Metal Workers Local 6,
110 S. Ct. 424 (1989) 11

Caterpillar v. Williams,
482 U.S. 386 (1987) 18

Chevron Oil Co. v. Huson,
404 U.S. 91 (1971) 22

Clayton v. UAW,
451 U.S. 679 (1981) 24

Commonwealth Edison Co. v. Montana,
453 U.S. 609 (1981) 18

DelCostello v. Teamsters,
462 U.S. 151 (1983) 22, 24

Emporium-Capwell Co. v. Western Add'n Cmnty. Organization, 420 U.S. 50 (1975) 9

Ford Motor Co. v. Huffman,
345 U.S. 330 (1953) 9

Franchise Tax Board v. Laborers Vacation Trust,
463 U.S. 1 (1983) 20

Hechler v. IBEW,
772 F.2d 788 (11th Cir. 1985),
rev'd, 481 U.S. 851 (1987) 5

Hines v. Anchor Motor Freight,
424 U.S. 554 (1976) 10

Hunter v. United Van Lines,
746 F.2d 635 (9th Cir. 1984) 20

IBEW v. Hechler,
481 U.S. 851 (1987) ..... *passim*

J.I. Case Co. v. NLRB,
321 U.S. 332 (1944) 9

Kinney v. IBEW,
669 F.2d 1222 (9th Cir. 1981) 15

Lewis v. Teamsters Local 771,
826 F.2d 1310 (3d Cir. 1987) 15

Lingle v. Norge,
108 S. Ct. 1877 (1988) 2, 14

Motor Coach Employees v. Lockridge,
403 U.S. 274 (1971) 13

NLRB v. Marine Workers v. NLRB,
391 U.S. 418 (1968) 24

OCAW v. Zeeger,
768 F.2d 1480 (D.C. Cir. 1988) 2

Plumbers v Plumbers Local 334,
452 U.S. 615 (1981) 7, 15

Public Citizen Health Research Group v. Brock,
823 F.2d 626 (D.C. Cir. 1987) 2

Reed v. UTU,
109 S. Ct. 621 (1989) 22

Republic Steel Corp. v. Maddox,
379 U.S. 650 (1965) 23

Steele v. Louisville & Nashville Railroad,
323 U.S. 192 (1944) 9, 11

Teamsters Local 174 v. Lucas Flour Co.,
369 U.S. 95 (1962) 15

Textile Workers v. Lincoln Mills,
353 U.S. 448 (1957) 7

UAW v. Hoosier Cardinal Corp.,
383 U.S. 696 (1966) 22

UPS v. Mitchell,
451 U.S. 56 (1981) 22

Vaca v. Sipes,
386 U.S. 171 (1967) 9, 23

Wallace Corp. v. NLRB,
323 U.S. 248 (1944) 9

Wes. v. Conrail,
481 U.S. 35 (1987), ... 2

STATUTES

Labor Management Relations Act,
29 U.S.C. §§ 151 *et seq.*
Section 203(d), 29 U.S.C. § 173(d) 2
Section 301, 29 U.S.C. § 185 ..... *passim*

Mine Safety and Health Act,
30 U.S.C. §§ 801 *et seq*..... 2

Occupational Safety and Health Act,
29 U.S.C. §§ 651 *et seq*..... 2

National Labor Relations Act
29 U.S.C. §§ 151 *et seq*. 9, 10, 13

Section 9, 29 U.S.C. § 159 9

Railway Labor Act,
45 U.S.C. §§ 151 *et seq*. 9, 10

OTHER AUTHORITIES

Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973) 24

Goldberg, *Winning at the Occupational Safety and Health Review Commission* (Health Research Group 1981)..... 2

Restatement (Second) of Torts 4, 14

U.S. Chamber of Commerce,
1979 Analysis of Workers Compensation Laws 3

U.S. Chamber of Commerce,
1989 Analysis of Workers Compensation Laws 3

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

No. 89-322

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,
v.
THARON RAWSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR SETH RAWSON AND CINDY RAWSON; BERNIECE JOHNSON, INDIVIDUALLY AND AS GUARDIAN *AD LITEM* FOR MICHAEL WAYNE JOHNSON; LAURA DUNBAR, AS GUARDIAN *AD LITEM* FOR RICKINA ROSSITER AND GLEN ROSSITER, JR.; AND MARY WOOD, AS GUARDIAN *AD LITEM* FOR LESLIE D. WOOD,
Respondents.

BRIEF OF PUBLIC CITIZEN AS *AMICUS CURIAE*

INTEREST OF AMICUS CURIAE

Public Citizen is a public interest organization which was founded in 1971 by Ralph Nader. Attorneys for Public Citizen have litigated numerous cases concerning the various legal principles that converge in answering the

questions presented here. Thus, Public Citizen's attorneys have represented numerous union members in litigation arising from inadequate representation by their unions, *e.g.*, *West v. Conrail*, 481 U.S. 35 (1987), and in cases raising the question of whether minimum labor standards are preempted by federal labor law, most important by sections 203(d) and 301 of the Labor-Management Relations Act ("LMRA"). *E.g.*, *Lingle v. Norge*, 108 S. Ct. 1877 (1988); *Barrentine v. Arkansas Best Freight System*, 450 U.S. 728 (1981). Public Citizen has also been deeply involved in the enforcement of the Occupational Safety and Health Act and the Mine Safety and Health Act, including activities ranging from rule-making petitions before the Department of Labor to challenging the Department's subversion of that Act in the courts. *E.g.*, *Public Citizen Health Research Group v. Brock*, 823 F.2d 626 (D.C. Cir. 1987); *OCAW v. Zeeger*, 768 F.2d 1480 (D.C. Cir. 1988). *See also* Goldberg, *Winning at the Occupational Safety and Health Review Commission* (Health Research Group 1981).

Public Citizen has found that employee involvement in workplace safety inspections is crucial for strong occupational safety enforcement. We also share the fear expressed by the petitioner that if state courts unthinkingly impose liability on unions for their participation in such inspections, even if done for the best of reasons, that may cause unions to react by limiting the extent to which they permit their members to participate on their behalf. On the other hand, we are concerned that the expansive arguments for federal preemption upon which petitioner relies may invalidate state law claims that ought to be permitted. Public Citizen files this brief, with the written consent of the parties, in order to explain our view on how this case should be decided without having to resolve

these competing considerations on an all-or-nothing basis, and in a way that would determine only the case now before this Court.

STATEMENT

This case arose from a 1972 mining accident in the Sunshine Mine in Kellogg, Idaho, in which ninety-one miners died, including respondents' decedents. The workers' families collected limited benefits under the state workers compensation system which, under Idaho law, provides the exclusive means of redress against employers for workplace injuries. Because Idaho's workers compensation system is so inadequate (the survivors' benefits have consistently ranked among the lowest in the nation, U.S. Chamber of Commerce, *1979 Analysis of Workers Compensation Laws* Chart VII, U.S. Chamber of Commerce, *1989 Analysis of Workers Compensation Laws* Chart VIII), the families then began a search for other sources to compensate them for their losses. This action against the United Steelworkers of America ("USWA"), the international union that entered into a collective bargaining agreement ("CBA") covering the Sunshine Mine, is the only such claim that has survived summary dismissal. In it, respondents alleged that, pursuant to the CBA and the USWA Constitution, members of Steelworkers Local 5089 had participated in various inspections of the Mine but had negligently failed to notice or call to management's attention various safety problems which, had they been corrected, could have prevented decedents' injuries.

Respondents claimed that this negligence was actionable under state law fraud and tort theories. The

fraud claim, which was based on supposed representations by the union that it had special expertise in safety and that it would use that expertise to protect members from accidents, was dismissed for lack of evidence. Pet. App. 16a-18a. However, the Idaho Supreme Court upheld the negligence claim under state law, relying on the Restatement of Torts which imposes liability for negligence on one who "undertakes" to render services to another. Pet. App. 19a. The court found "the basis for a negligent undertaking" in two places: Article 9 of the CBA, which provided for a plant safety committee and permitted workplace inspections by that committee, and the International's Constitution, which required the establishment of safety and health committees in each local union. Pet. App. 24a. The Court concluded, "Because the union, pursuant to the provisions of the [CBA], had contracted to inspect and *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care . . .." Pet. App. 29a (emphasis in original).

The Idaho court also held that the state law negligence claim was not preempted by section 301 of the LMRA, purporting to distinguish this Court's holding in *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). Under *Allis-Chalmers*, any state law claim that is substantially dependent on an interpretation of a CBA is preempted by section 301 because it is in reality a section 301 claim that is governed by principles of federal labor law. The Idaho court readily conceded that the provisions of the CBA would "determine . . . the nature and scope of the Union's duty," but reasoned that the more important question in the case was whether the duty imposed by the CBA had been violated. Pet. App. 33a-34a. In the view of the court below, such limited reliance on the CBA was not sufficient

to displace the substantial interest of the state in preventing common law negligence. Pet. App. 34a-35a, *citing Hechler v. IBEW*, 772 F.2d 788 (11th Cir. 1985), *rev'd*, 481 U.S. 851 (1987).

After this Court reversed the *Hechler* decision on which the Idaho court relied, it vacated the decision in this case and remanded for reconsideration in light of *Hechler*. On remand, the union asked the court to reconsider its state law holdings as well as its preemption analysis, but the court pointedly refused to do so, holding that its analysis of state law was the "law of the case" and would not be reopened. Pet. App. 9a. On the preemption issue, the court distinguished this case from *Hechler* on the ground that, unlike that case, here "the tort exists without reference to the [CBA]." Pet. App. 7a. The court did not say how such reference could be avoided in establishing the "nature and scope" of the union's undertaking, because it asserted, albeit without citation to the record, that "the parties concede that the union did actively *undertake* the subject inspection *duties*." Pet. App. 6a. (emphasis added).

SUMMARY OF ARGUMENT

In many ways, this is a case in which the facts cry out for relief. There has been a terrible accident, which took the lives of ninety-one miners. The miners' decedents have received grossly inadequate payments for the loss of their loved ones, and this is the only remaining case that can provide such compensation. In those circumstances, many courts might be influenced to find a way to hold the petitioner liable, and we believe that the lower court was influenced by the absence of any other basis for relief to

find a way for these claims to survive. But it is important to remember that the fundamental wrong here was committed by the employer, which maintained an unsafe workplace, and that the reason why respondents received inadequate compensation from their employer is that Idaho has made the basic policy choice to eliminate an employer's liability for negligence and to substitute a rule of absolute liability, coupled with very low monetary remedies.

On the other hand, the petitioner also has a very appealing case. It can point to the fact that, at most, it only failed to tell the employer that the Sunshine mine was unsafe, and it can make the point, with which Public Citizen is in fundamental agreement, that the consequence of imposing liability on unions for conducting negligent safety inspections may be to discourage them from conducting any inspections at all.

Although, as we have indicated, Public Citizen shares petitioner's concern about the impact of a state rule imposing blanket liability for negligent inspections, we do not agree with petitioner that the sole measure of a union's performance on behalf of its members is whether it has acted arbitrarily or discriminatorily toward them, under the federal principles established by the duty of fair representation ("DFR"). In our view, there are a number of instances in which the states may be permitted to impose some obligations on a union's representation of its members beyond the DFR. The question of whether the federal duty excludes all state duties in any circumstances is sufficiently difficult and complex that we urge the Court not to reach it because, as we argue below, it is unnecessary to do so here.

It is unnecessary to consider the DFR preemption question because it is apparent that respondents' state law

claims are preempted by section 301 of the LMRA. The state court held, as a matter of state law, that a union can be held liable if it makes an "undertaking" to conduct inspections, and it found such an undertaking in two documents: the CBA between petitioner and the Sunshine Mine, and petitioner's constitution. Under this Court's precedents, both documents are "agreements" whose enforcement has been committed solely to the province of federal law, under principles based on federal labor policy that are to be developed under this Court's guidance. *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957); *Plumbers v Plumbers Local 334*, 452 U.S. 615 (1981). Although the Idaho Supreme Court asserted in conclusory terms that reference to the CBA is not required, that court identified no source other than those two documents for the union's alleged undertaking that underlies the state duty. Hence, the principles of federal law must govern the determination of the scope and nature of that duty.

To say that section 301 controls that question, however, is not automatically to resolve the case in petitioner's favor. Although a violation of the DFR is normally required before a court may reach the question of whether an *employer* violated the CBA, there is no basis for requiring a breach of the DFR before a *union* may be held to have violated one of its own undertakings in a CBA or in its constitution. Nor would there be any basis for concluding that a union's contractual undertakings, and the federal enforcement of those undertakings, is somehow "preempted" by the DFR. It may be unusual for a union to make affirmative promises in a CBA, but that is what respondents alleged here, and they are entitled to have a court pass on those allegations.

Turning to the CBA here, petitioner does not appear to us to have made any affirmative undertaking to protect members against the employer's unsafe practices, and certainly not the kind necessary to assume a major portion of the employer's vast potential liability for unsafe practices. The constitution also seems to contain no more than vague statements of objectives, not commitments to guarantee certain results or even efforts of a certain quality. Accordingly, the judgment below should be reversed, and unless respondents can point to something else in the record indicating that they will be able to make a showing that the constitution contains such a promise, the Idaho courts should be instructed to dismiss the action.

ARGUMENT

I. THE QUESTION OF THE CIRCUMSTANCES IN WHICH THE STATES MAY REGULATE A UNION'S REPRESENTATION OF ITS MEMBERS DURING THE TERM OF A COLLECTIVE BARGAINING AGREEMENT RAISES COMPLEX ISSUES OF FEDERALISM THAT SHOULD BE AVOIDED UNLESS THE QUESTION IS SQUARELY PRESENTED.

Although nowhere expressly set forth in any labor statute, the duty of fair representation is a necessary product of the fact that a free society, which places a high value on the rights of the individual, nevertheless makes collective bargaining the central element of its national labor policy. Federal law gives a majority of employees in an appropriate bargaining unit the right not only to choose a representative for purposes of collective bargaining, but

also to impose their choice on all other employees in the unit, depriving the minority of the right to bargain for themselves. National Labor Relations Act ("NLRA"), Section 9, 29 U.S.C. § 159. *See Emporium-Capwell Co. v. Western Add'n Cmnty. Org.*, 420 U.S. 50 (1975). This exclusive representative (the union) has the right to abrogate any bargains that might be struck by individual employees. *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944). Moreover, once an agreement has been reached, the union has the exclusive authority to decide in each case whether to use the enforcement mechanisms created by it — normally a grievance and arbitration system — to seek redress for violations of the contractual rights of individual members. *See Vaca v. Sipes*, 386 U.S. 171, 190-191 (1967).

In a free society, such authority carries with it a responsibility to the individuals whose bargaining rights are thus extinguished. Indeed, as the Court recognized in *Steele v. Louisville & Nashville R.R.*; 323 U.S. 192, 198-199 (1944), grave constitutional questions would arise unless the union also had a duty to exercise these statutory powers in a manner fair to all employees. Although *Steele* arose under the Railway Labor Act, the Court found a similar duty to represent employees "fairly and impartially" under the NLRA. *Wallace Corp. v. NLRB*, 323 U.S. 248, 255 (1944); *Ford Motor Co. v. Huffman*, 345 U.S. 330, 337 (1953). And, because the collective representative also controls the individual's access to the grievance system, the Court has ruled that the DFR extends to a union's exercise of its grievance handling authority, as well as to the power to negotiate contracts, which was involved in earlier cases. *Vaca v. Sipes*, 386

U.S. 171 (1967); *Hines v. Anchor Motor Freight*, 424 U.S. 554 (1976).

In recent cases, the AFL-CIO and its constituent international unions have tried to persuade the Court to transform the duty from a limitation on a union's exclusive authority into a shield against state regulation, by ruling that only the federal government may regulate the manner in which unions exercise their discretion in the representation of the employees whom they represent. *E.g., IBEW v. Hechler*, 481 U.S. 851 (1987), Second Question Presented. Their theory is that, by (implicitly) creating the duty of fair representation ("DFR") as a concomitant of the exclusive representation authority granted to unions by the National Labor Relations and Railway Labor Acts, Congress intended to preclude the states from regulating in any way the decisions made by unions in the course of such representational activities.

We agree that there are some, and probably many, representational decisions that may not be regulated by the states. However, there are a number of union decisions that may be within the power of the states to regulate, and Public Citizen is worried that, in addressing the broad question that the petitioner poses here, the Court might unnecessarily resolve a host of other questions that should await another day when their facts and supporting arguments are directly before the Court.

In our view, the Court need not decide the broad question that petitioner seeks to present because a more direct and better established ground for preemption would fully resolve this case. Thus, as we argue in Part II of this brief, the tort duties that have been held by the Idaho Supreme Court to have been imposed on petitioner are all based on promises supposedly made by the union and the

enforcement of those promises is governed by section 301 of the LMRA.

Petitioner seems to suggest that the question of DFR preemption is an all or nothing proposition — that either states can impose no duties on a union with respect to the representation of its members, or the floodgates open and unions can be subject to any manner of conflicting regulations, policies and forums in the various states with respect to all of their activities. We are not so sure that the solution is so clear. Whether state regulation is permitted may depend on the area of the union's activities and the relative strength of the interests of the state. It may also depend on the standards according to which the DFR is applied, which have evolved from the Court's initial decision in this area in *Steele*, which concerned racial discrimination in the negotiation of CBAs, through the recent decision in *Breininger v. Sheet Metal Workers Local 6*, 110 S. Ct. 424 (1989), which concerned arbitrary as well as discriminatory conduct in the administration of a union hiring hall. And it may depend on the extent to which the DFR is flexible enough to incorporate the substantive regulations that the state may impose on the workplace, while nevertheless preserving federal procedures and a federal forum to ensure that the policies underlying federal labor laws are not ignored.[1]

---

[1] For example, union discrimination against certain groups of members is plainly something that the DFR forbids, but state law may have a substantial role to play in determining which forms of discrimination are prohibited. After all, there are many kinds of "discrimination" that a union may presumably undertake without running afoul of the DFR. For example, most courts would acknowledge that a union may choose to favor high seniority over low seniority workers. On the other hand, suppose that, as a matter of public policy, some states choose to extend protections to

continued

This is not a field, after all, in which either the basis for preemption or indeed the basis for the substantive standards of federal law have been set forth in any statute. To the contrary, both the standards of the DFR and the argument for preemption are based on judge-crafted policies that have been inferred from the very sketchiest of statutory language and, indeed, have been created in part simply to avoid serious constitutional questions. In those circumstances, the Court has every reason to avoid ruling for or against preemption as an all-or-nothing matter, and indeed to proceed with great caution and avoid the question altogether if, as we suggest, there is an alternate basis for deciding this case.

Petitioner couches its Question Presented in what might be argued to be narrow language, including only union decisions made in the course of "administering and enforcing" provisions of a CBA, and it may be that in arguing the merits petitioner will concentrate on that proposition, while eschewing the more expansive language in its Petition extending its argument to all decisions that unions make "to deal as they and their members deem best with problems in the workplace." *Id.* at 21. However, we are concerned that the broader view may prevail because most of a union's activities could be construed to fall within the ambit of contract administration and enforcement.

---

whistleblowers who report on plant problems that cannot be corrected without making the plant unprofitable, or to workers carrying the HIV virus. Even if, under the DFR as presently construed, a union might be able to rationalize a decision not to protect such workers on the ground that the workers' larger economic interest points in another direction, the fact of state law protection might be recognized by federal law in determining that this is a kind of discrimination that is actionable.

It may also be that, in advocating preemption of state regulation of a union's efforts to "administer or enforce" the provisions of a CBA, petitioner intends to foreclose state regulation only of union enforcement of rights that depend for their existence solely on the CBA itself. But, if that is all that petitioner seeks in its DFR preemption defense, then its argument depends on the underlying premise that the state law rights asserted by the respondents are substantially dependent on the CBA, and that, as we show in the next section of this brief, is also the predicate of section 301 preemption. Therefore, that reading of petitioner's argument would make it wholly unnecessary to reach the DFR preemption issue because the same premise produces the same result under the well-established doctrine of preemption of state law claims under section 301, to which we now turn.[2]

---

[2] If petitioner were correct that it is "settled law" that the DFR preempts state law governing the manner in which unions represent their constituents, Petition at 15, *citing Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), then it would not matter that petitioner was only seeking a restatement of that settled conclusion. However, *Lockridge* did not go quite so far as petitioner suggests. In that case the plaintiff's theory was that the union had misread the CBA, and it was in that context that the Court held that the DFR created the standard governing union-employee relations. Moreover, the union there had sought the worker's discharge for failure to comply with a union security clause, a matter that is specifically regulated by the NLRA, and hence court regulation of the subject would interfere with the jurisdiction of the National Labor Relations Board. Therefore, as we read *Lockridge*, it does not control this case.

II. RESPONDENTS' STATE LAW CLAIMS ARE PREEMPTED BY SECTION 301 BECAUSE THEY ARE SUBSTANTIALLY DEPENDENT ON THE INTERPRETATION OF THE CBA AND THE UNION CONSTITUTION.

This Court held in *Allis-Chalmers v. Lueck*, 471 U.S. 202 (1985), that tort claims under state law that substantially depend on an interpretation of a CBA are preempted by section 301. On the other hand, if the claim is not substantially dependent on interpretation of the CBA, the Court has held that the state law claim is not preempted. For example, the state law claim might be merely parallel to a claim that could be based on a CBA, *Lingle v. Norge*, 108 S. Ct. 1877, 1883 (1988), or CBA-related questions might be merely tangential to the central issues of the case, *id.* at 1885 n.12, or there could be substantial issues of state law that are independent of the CBA, as well as important issues that arise under the CBA. *Id.* As in any case in which section 301 preemption is raised as a defense, the questions here are what theories of recovery are permitted under state law, and can those theories prevail without reliance on the CBA?

Respondents' theory of tort liability under state law is based on Sections 323 and 324A of the Restatement (Second) of Torts, which impose liability for the negligence of one who "undertakes, gratuitously or for consideration, to render services to another." The crucial requirement for the purposes of this case is that there must have been an "undertaking," and the question thus becomes, what was petitioner's undertaking? It seems perfectly clear from a reading of the decisions of the Idaho Supreme Court, at least until the reconsideration that this Court ordered after

IBEW v. Hechler, that the Idaho courts would recognize only two undertakings: the CBA and the USWA constitution.

Obviously, the CBA is a contract whose enforcement is exclusively the domain of federal law under section 301, *Teamsters Local 174 v. Lucas Flour Co.*, 369 U.S. 95 (1962). This Court has also held that, at least when suit is brought by one union entity against another to enforce the union constitution, the constitution is properly treated as a "contract[] . . . between any . . . labor organizations" whose enforcement is similarly governed by section 301. *Plumbers v. Plumbers Local 334*, 452 U.S. 615 (1981). Although the Court did not decide whether a union constitution is still a section 301 contract when it is an individual member who sues the union, *id.* at 627 n.16, the courts of appeals have been unanimous since *Plumbers* that there is no reason why a constitution would be a section 301 contract when a union is a plaintiff but not when an individual is a plaintiff. *Lewis v. Teamsters Local 771*, 826 F.2d 1310, 1312-1314 (3d Cir. 1987); *Kinney v. IBEW*, 669 F.2d 1222, 1229 (9th Cir. 1981). Indeed, because controversies about the meaning of union constitutions will often affect the manner in which unions conduct their bargaining functions, there is no reason not to follow the plain meaning of the language of section 301 by holding that constitutions are contracts and therefore that federal law rather than state law governs the resolution of controversies arising under them.

On remand for reconsideration in light of *IBEW v. Hechler*, and in order to avoid preemption, the Idaho Supreme Court asserted that the state law claims were independent of the CBA. But that conclusion is not enough to preserve the claims against preemption. To the contrary,

as the Court said in *Allis-Chalmers*, "[w]hile the nature of the state tort is a matter of state law, the question whether the [state] tort is sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law." 471 U.S. 213-214. In order to make a judgment on that federal law question, the Court should do as it did in *Allis-Chalmers*: it should examine the opinions of the state courts to determine the precise theories on which a tort plaintiff is permitted to proceed, and then decide whether those theories ultimately rely on the meaning of the CBA.

In *Allis-Chalmers*, the state tort of bad faith denial or delay in paying insurance benefits was deemed substantially dependent on the CBA because a court could not decide whether the tort was committed without first deciding whether the contract required the benefits, whether it required their award within a certain time period, and whether certain remedies were appropriate for denial or delay in payment. 471 U.S. at 214-220. In effect, the state tort in that case was piggy-backing on a claim of contractual violation. The tort in this case is similarly piggy-backed on a claimed contractual right, because a court cannot decide whether the duty to inspect was negligently performed without first deciding what duty petitioner had "undertaken" and what the scope of that duty was, for which the only sources were the CBA and the union constitution.

Although the Idaho Supreme Court *said* in its post-*Hechler* analysis of federal preemption that the state tort could be applied without construing the contract, Pet. App. 6a, it did not explain how that could happen (except by reference to a supposed "concession" by the union, *see infra* at page 20-21). Even more important, in the course

of addressing the *federal* question, the Idaho Court pointedly refused to reopen the *state* question concerning the nature of the state tort. Pet. App. 8a-9a. Thus, the Court must look to the Court's pre-*Hechler* opinions to ascertain the "undertakings" on which the state tort is founded. And, as we have discussed above, those undertakings are clearly contracts whose enforcement is governed by principles of federal law.

We have also examined respondents' Opposition to the Petition for Certiorari in order to try to determine whether they relied on any "undertakings" other than the CBA and the constitution. Although the Opposition repeatedly asserts that respondents' claims are independent of the CBA, it never identifies the independent "undertaking" on which respondents rely, apart from the CBA and the constitution.

We anticipate that, in their brief on the merits, respondents will argue that the "undertaking" arose from the fact that the union performed inspections, a fact that can be ascertained independent of any construction of the CBA. However, even if respondents assert that the act of inspecting the mines alone is enough to incur duties that are enforceable in tort by anyone injured by the failure to point out safety problems, the assertion of the existence of duties must in fact be valid under state law, and there is no evidence that such is the case.

The major flaw in a theory that mere performance of the inspections was enough to make petitioner liable for the safety committee's mistakes is that there is nothing in the decisions of the Idaho Supreme Court that indicates that this theory is viable under state law. The Idaho courts have by now had ample opportunity to explicate the law as it applies to this case, and if at this late date those courts

have not embraced a theory of "liability by mere conduct," it would be inappropriate for this Court to save respondents' claims from preemption on that theory.[3]

The best respondents can do is to point, out of context, to the passage in the Idaho Supreme Court's opinion that "Because the union, **pursuant to the provisions of the [CBA]**, had contracted to inspect and *in fact inspected* the mine, it owed the (minimal) duty to its members to exercise due care . . .." Pet. App. 29a (only italicized matter emphasized in original). But in quoting this passage, Opposition at 7, respondents omit the material set forth in bold letters, which makes clear that the state court imposed liability because the inspection was conducted pursuant to an undertaking in the CBA.

The unlikelihood that the Idaho Supreme Court would adopt such a position is underscored by the potential reach

---

[3] On the other hand, when preemption claims are litigated in federal court, such as because the case was removed on a theory of complete preemption, *see Caterpillar v. Williams*, 483 U.S. 386 (1987), there is a danger that the federal court will improperly construe state law in such a way that it depends on the CBA, and then use that erroneous construction as a basis for finding preemption, without ever giving the employee plaintiff an opportunity to ask the state courts for a ruling on a novel state law claim. Given the general presumption against preemption of state law, *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 634 (1981), the burden is rightly placed on the proponent of a section 301 preemption defense to demonstrate that a novel theory of state law, which the plaintiff contends would avoid the need to construe a CBA, would in fact not be accepted in the state courts. Here, however, respondents have had every opportunity to obtain a ruling on whatever state law claims they wished to advance, and if they cannot point to any Idaho court acceptance of the theory of liability for mere performance, they should not be able to avoid preemption by appealing to the possibility that such a theory might be deemed acceptable if the state courts were to focus upon it.

of a ruling that anyone who looks at the safety devices in a mine necessarily incurs responsibility for injuries that occur thereafter. For example, suppose that a cousin of the mine-owner had accompanied a management safety inspection because she was taking a class at the local university on mine safety and wanted to see what a mine looks like. Surely, respondents would not contend that the state courts would impose personal liability on the cousin for the ninety-one deaths that followed, unless the cousin also "undertook" to do the inspection as a service to management or to the union membership. Yet in order to determine here whether the union "undertook to render services to another", which is what the Restatement requires, and in order to determine the scope of the "service" undertaken, the state courts would have to look to the CBA and the constitution, and not just to the fact of inspection.

Indeed, there is another fact in the record — undisputed so far as we are aware — that respondents do not discuss, and which further undercuts their theory. In this case, the appointments to the safety committee were made, not by petitioner USWA, but by Steelworkers Local 5089, which is not a defendant in this case, presumably because it does not have a deep pocket. Pet. App. 94a-95a. In order to demonstrate that the mere action of the safety committee was an "undertaking" by petitioner, respondents would no doubt have to rely on the CBA (to which petitioner was a party) and the USWA constitution to show that the USWA undertook to be responsible for the errors of safety committees controlled by officers of its autonomous locals. Thus, it seems clear that the state tort entirely depends on

a construction of the CBA and the constitution, and so is preempted by section 301.[4]

The final fingerhold to which respondents may try to cling is the assertion, made in the Idaho Court's post-*Hechler* opinion, that there is no issue of contract interpretation under section 301 because "the parties" conceded that the union "did actively undertake" safety inspection duties. Pet. App. 6a, *see also id.* 5a. Although this assertion relies on a kernel of correct legal analysis, its application to this case has no basis either in fact or in law.

The notion that the union's "concession" avoids preemption is based on the indubitable proposition that, for there to be complete preemption under section 301, there must be a genuine dispute about the interpretation or application of the CBA to which federal law must be applied. *See Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 13 (1983); *cf. Hunter v. United Van Lines*, 746 F.2d 635, 648 n.8 (9th Cir. 1984). But it is hard to see how that rule can be applied to avoid preemption here, because, so far as we are aware, petitioner has never conceded that, properly construed, the CBA (or its

[4] We understand that respondents sought to rely on certain detailed manuals supplied by the petitioner to instruct local safety committees on how to improve workplace safety. To the extent that these manuals constitute a form of regulation of the locals adopted under the constitution, or even are a set of independent agreements with the locals, their existence does not change the fact that the ultimate question of international responsibility for the local union's negligence depends in large part on an interpretation of the constitution, a question on which federal law governs. The manuals may also bear on the question of whether the inspections were properly done, but of course that does not help respondents avoid the need to rely on section 301 contracts in order to sustain their state law theories.

constitution) contained any undertaking to provide inspection services, not to speak of an undertaking of this kind and magnitude. Nor, indeed, did the post-*Hechler* opinion identify the place in the record where the union made such a concession, and the Idaho Court's pre-*Hechler* opinions pointed only to the CBA and constitution (whose existence was conceded, but whose meanings and significance were hotly contested) as evidence of the union's undertaking. Thus, respondents cannot rely on the contention that the application of the CBA and the constitution to this dispute is uncontested as a basis for avoiding preemption of their tort claims by section 301.

III. THE JUDGMENT BELOW SHOULD BE REVERSED.

The conclusion that respondents' tort claims are preempted by section 301 does not require their dismissal. Rather, the preemptive force of section 301 merely converts the tort claims into section 301 claims based on the union's alleged undertaking to perform safety inspections, and requires that those claims be resolved according to federal law principles. Because the courts below never focused on the manner in which such federal law principles should be applied to this case, the Court may conclude that it would be appropriate to remand the case to the lower courts to permit them to address those issues in the first instance. On the other hand, the age of this case, the apparent hostility of the Idaho Supreme Court to the application of federal principles, and the possibility that there may be some dispositive procedural issues may lead the Court to exercise its discretion to decide the federal questions now. In the event that the Court opts for the latter course, we

explain how we think this case should be resolved under the principles of section 301.

A. First, there is the question of whether the section 301 action was timely filed. In *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696 (1966), the Court held that the proper limitations period for suing to enforce a CBA under section 301 should be borrowed from the state statute of limitations for suing to enforce an oral contract. On that theory, this case, which was filed less than a year after the mine disaster, should not be dismissed as untimely. The much shorter limitations periods adopted in *UPS v. Mitchell*, 451 U.S. 56 (1981), and *DelCostello v. Teamsters*, 462 U.S. 151 (1983), should not be applied for two reasons. First, this case does not involve a challenge to an arbitration decision, as *Mitchell* did, and the case does not threaten, as *DelCostello* did, an accommodation between employer and union reached in the course of collective bargaining or contract administration. Thus, as this Court indicated in *Reed v. UTU*, 109 S. Ct. 621 (1989), only claims that are closely analogous to hybrid actions against the union and the employer, and that do threaten a labor-management compromise in the same fashion as hybrid claims do, should be subjected to the six-month limitations period adopted in *DelCostello*. Moreover, this case was brought so long before *Mitchell* and *DelCostello* were decided, and so long before the approaches adopted in those cases were accepted by any court, that the retroactivity principles of *Chevron Oil Co. v. Huson*, 404 U.S. 91 (1971), would make retroactive application of a short limitations period highly inappropriate.

Nor would it be appropriate to dismiss for failure to exhaust contractual remedies or, in the alternative, for failure to show that the union's breach of its DFR

prevented respondents from exhausting. That course would plainly be appropriate if respondents were suing to enforce the CBA against the employer, and could have asked the union to file a grievance in their behalf by invoking the procedures provided by the CBA. *Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1965); *Vaca v. Sipes*, 386 U.S. 171 (1967). Here, however, respondents claim that the union violated its own section 301 "undertaking." Not only is there no indication that the CBA's grievance procedure applies to claims based on alleged union violations of the CBA or of its constitution, but it is unreasonable to suggest that respondents should have relied on either of the parties to the CBA — the union or the employer — to represent them in any such grievance procedure. And although petitioner has argued that the DFR ought to preempt respondents' *state* law claims, we see no basis for a similar conclusion that, once those claims are transformed by section 301 preemption into a federal law claim, the DFR ought to have any effect on that federal claim.

Put another way, to the extent that a union makes a promise, whether to its members or to the employees whom it represents, we see no reason why federal labor law should strip those workers of the benefit of that promise and replace it with a more limited protection afforded by the judge-made standards of the DFR. *Cf. Belknap v. Hale*, 463 U.S. 491 (1983). But we do agree that those promises should be under section 301, and it is to the question of how to apply that section in this case that we now turn.[5]

---

[5] Arguably there might be a requirement of exhaustion of intra-union remedies, depending on whether any of the exceptions to that

continued

B. This Court, or another court, will have to reach the merits of respondents' section 301 claim that the CBA and the constitution contained promises by the union to conduct safety inspections and thereby to protect the employees in the bargaining unit against safety hazards. The ensuing analysis of the CBA should be conducted in light of "the realities of industrial life." *DelCostello v. Teamsters*, 462 U.S. 151, 172 (1983). Here, the feature of labor relations that seems most significant here is that CBAs most commonly consist of promises exacted by the union from management, limiting the discretion that management would otherwise have in controlling the operations of the workplace, in return for a very limited set of promises made by the union to management, *i.e.*, the commitment not to engage in strikes and other interruptions of work during the term of the agreement. *Boys Markets v. Retail Clerks Local 770*, 398 U.S. 235 (1970). *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663 (1973). We would not rule out the possibility that some CBAs may contain promises from a union to its membership, although most commonly those promises will be found elsewhere (such as in the union constitution). But in light of the nature of labor relations and of the contents of most CBAs, the courts should not lightly presume that vague language in a CBA was intended to constitute a promise from a union to its members. Rather, the courts should insist that, before a CBA should be construed to create obligations on the part

---

doctrine applied. *Clayton v. UAW*, 451 U.S. 659 (1981). However, because that defense only requires a court to stay its hand pending completion of the exhaustion, *id.* at 695; *NLRB v. Marine Workers*, 391 U.S. 418, 426 (1968), it seems highly unlikely that applying the doctrine here would help resolve the dispute between these parties.

of the union to the membership, there should be clear language to that effect in the contract, or at least some terms of art commonly recognized as creating such obligations. A requirement of express language is especially appropriate where, as here, the alleged obligation would impose a new set of duties on the union, with the possibility of enormous liabilities resulting from any failure to meet them.

C. Turning to the CBA in this case, respondents and the Idaho courts have relied exclusively on Article 9, but that language contains nothing that directly guarantees employees that their union will protect them against safety hazards. Section 1 states simply that the employer and the union "will continue to cooperate toward the objective of eliminating . . . hazards." Pet. App. 169a. If this sentence contains anything more than platitudes, it is an exchange of promises between the union and the employer; it does not purport to promise anything to the employees.

Section 2 requires the union to approve "reliable" employees to participate in an inspection with an equal number of supervisors if, following a complaint by an individual employee, the employee believes that there are problems that have not been corrected. Pet. App. 169a. These inspectors together have the power to decide what should be done, if anything, to correct the hazard of which the employee complained. This section does not require the employer to accept union suggestions, and inasmuch as the inspectors must decide jointly on any action to be taken, that cannot occur unless management's representatives concur with the views of the union's representatives. And, if there is disagreement between the two sides, the union can do no more than file a grievance. Furthermore, this section applies only where an

employee makes a complaint and is dissatisfied with management's response, but the record does not suggest that any of the decedents in this case (or anyone else) made the complaints required by Section 2, which would qualify them or their heirs to assert whatever rights this section gave them.

Similarly, sections 4 and 5 give the union only the right to have union representatives "accompany" state inspectors or company safety engineers, respectively, on tours of the mine. Pet. App. 171a. These sections do not expressly require the union to do anything either during or after the inspection, except to "consider" the "results" of the tours at meetings with management. If, as we suggest, an explicit statement of union obligation is required to impose liability on the union for alleged failure to comply with a promise in a CBA, these sections simply are not sufficiently definite to warrant a finding of union liability.[6]

---

[6] If the court were to reject the general rule that we suggest, under which a union may be found to have made promises to the employees in a CBA only if there is express language to that effect, the Court might consider whether the employer's immunity from liability for its own negligence should, as a matter of federal law, shield the union from derivative liability for failure to encourage the employer to correct its own negligence. After all, it is the employer's negligence that causes mining accidents, and the union's "contribution" to the problem is simply its negligent failure to point out the employer's negligence or to compel the employer to correct its mistakes. Here, the employer has been released from the liability which it would ordinarily have by a state policy that requires minimal payments through the worker compensation system in return for immunity from tort litigation. In those circumstances, federal labor policy might require states that provide such immunity to the employer to extend a similar protection to unions that would only be secondarily liable based on their promises to protect their constituents from the effects of the employer's negligence.

D. Last of all, respondents argue that they were guaranteed reasonable union inspections by the union constitution. It is highly unlikely that the vague constitutional provisions on which respondents rely, recognizing a general objective of "improving the conditions of employment" and requiring establishment of safety committees in each Local Union, *see* Pet. App. 24a, created a constitutional right, enforceable by a suit for damages, to have the union do a non-negligent job in achieving a safe workplace. But because union constitutions normally consist of promises by the union to the membership (and to its constituent locals), it would be inappropriate to apply the general rule requiring explicit language that we have suggested for reading CBAs.

It *would* be appropriate to follow another general rule, one that requires a court to defer to a reasonable, long-standing interpretation of the union constitution placed upon it by the governing body of the union, that is authorized by the constitution to render binding interpretations.[7] So far as we are aware, no such interpretation has been placed on the record. On the other hand, the constitutional provision itself does not seem to constitute any sort of undertaking by petitioner to guarantee either a safe workplace or safety enforcement efforts of a given quality. If anything, the constitution requires its *locals* to establish committees and, perhaps, encourages them to undertake commitments to their members. Given the age of this case, it seems unnecessary to remand the case unless respondents can

---

[7] The court should not permit such deference where the interpretation is rendered in the course of formulating a litigating position.

point to something in the record that supports their claim that petitioner made the undertaking on which their claim depends. If a remand is allowed, the Court should permit only the question of the meaning of the constitutional provision and any union regulations or procedures adopted under it to be decided by the courts below following appropriate proceedings pursuant to the principles of federal labor law that are applicable to actions such as this one under section 301.

CONCLUSION

The judgment should be reversed, and the case remanded to the Supreme Court of Idaho for further proceedings consistent with the foregoing analysis.

Respectfully submitted,

Paul Alan Levy
(*Counsel of Record*)
Alan B. Morrison

Public Citizen Litigation Group
Suite 700
2000 P St., N.W.
Washington, D.C. 20036
(202) 785-3704

Counsel for *Amicus Curiae*

February 9, 1990